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No. 98-130

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CONTINENTAL AIRLINES,
THOMAS E. ROSS, TRUSTEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner may require Respondent to "set off" against funds in the court registry (a) despite the finding below that Respondent owns the funds and no debt exists to set off; (b) despite the express terms of Respondent's confirmed plan of reorganization barring any setoff without Respondent's consent; (c) despite vesting of the funds free of Petitioner's claims under 11 U.S.C. § 1141 and the confirmation order, which Petitioner did not appeal; (d) despite findings below that Petitioner waived any right by lack of timely pursuit, by conduct disclaiming such rights, and by specific agreement; and (e) despite lack of mutuality required by 11 U.S.C. § 553.

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I. STATEMENT OF THE CASE

In the 1980s, the Government Services Administration ("GSA") adopted audit procedures to force airlines to fly Federal Government travelers at below market fares and unilaterally withheld millions of dollars of alleged "overcharges." Several airlines including Continental challenged the GSA's procedures before the Comptroller General who found in September 1990 that GSA's methods were improper. When GSA claimed it need not obey a decision of the Comptroller General, the airlines sued in federal district court for enforcement. *See Alaska Airlines, Inc. v. Austin*, 801 F. Supp. 760 (D.D.C.), *aff'd*, 8 F.3d 791 (Fed. Cir. 1993). The United States did not assert any defense of setoff in the case.

Continental filed its petition under Chapter 11 of the Bankruptcy Code in December 1990. Ten separate federal agencies, including the GSA, filed proofs of claim. Four agencies affirmatively disclaimed any setoff right. Only three, the Department of Transportation ("DOT"), the Federal Aviation Administration ("FAA"), and the Internal Revenue Service ("IRS"), claimed a right of setoff. None asserted a setoff right related to the funds wrongfully withheld by the GSA. (*See* Petitioner's Appendix (hereinafter "App.") at 32a-35a, 55a.) The United States remained silent regarding any claim of setoff before both the District Court and the Bankruptcy Court.

Subsequently, the Comptroller General reaffirmed his decision, but the GSA still refused to obey. In August 1992, the U.S. District Court, finding that "[i]n essence, the Government improperly has taken Plaintiffs' property

from them without any legal basis for doing so," entered an injunction requiring GSA to return the moneys wrongfully withheld, including $4,636,639.35 withheld from Continental. *Id.* at 42a. The GSA appealed and sought a stay. In lieu of a stay, the Federal Circuit Court of Appeals permitted GSA to pay Continental's money into the Bankruptcy Court registry for further disposition. (*See* App. at 20a.)

Continental submitted its Revised Second Amended Joint Plan of Reorganization (the "Plan") for approval in January 1993. Under § 14.8 of the proposed Plan, Continental alone retained the election to set off or recoup against any claim. (*See* Respondent's Appendix (hereinafter "Resp. App.") at 20.)

The IRS, the Department of Agriculture ("USDA") and the FAA each objected to the Plan. Although the District Court had ordered GSA to return the $4.6 million over eight months before, only the IRS objected to the Plan's provisions regarding setoff. Continental agreed to allow setoff against any taxes owed by Continental, but not to any other right to setoff with respect to any other claim. (*See* Resp. App. at 3a.) The objections of the USDA and the FAA did not mention setoff and were also resolved by stipulation. (*See* Resp. App. at 8a-10a.) The FAA had previously agreed to treatment of its claim as a general unsecured claim only, which agreement was embodied in § 14.14(b) of the Plan. (*See* Resp. App. at 21a.)

On April 16, 1993, the Bankruptcy Court confirmed the Plan as modified. Its order became final and nonappealable. On May 28, 1993, the U.S. moved the Bankruptcy Court to allow it to deduct the various claims filed by the ten agencies from the funds deposited with the registry of the Bankruptcy Court. The Bankruptcy Court denied the motion and ordered the funds released to Continental. On appeal, the District Court and the Third Circuit Court of Appeals affirmed.

II. REASONS NOT TO GRANT CERTIORARI

A. NO CIRCUIT COURT DECISIONS ARE IN CONFLICT

Section 1141(c) of the Bankruptcy Code vests all property of the estate in the debtor "free and clear of all claims and interests of creditors" upon confirmation of a plan of reorganization. Consistent with the statute, Continental's Plan and the order confirming it provide that all property of its estate vests in the reorganized entity "free and clear." (*See* Resp. App. at 19a and 25a.) The United States did not object to this language, the Confirmation Order, or Plan language specifically reserving discretion over the right to setoff to Continental. Based in part on §§ 1141(a) and (c) of the Bankruptcy Code, the courts below held that the setoff rights claimed by the United States were barred.

Only two Circuit Courts have addressed the interplay of § 553 and § 1141(c) or its counterpart in chapter 13, § 1327(a): the Third Circuit in this case and in *U.S. v. Norton*, 717 F.2d 767, 772 (3rd Cir. 1983) and the Ninth Circuit in *In re De Laurentiis Entertainment Group, Inc.*, 963

F.2d 1269 (9th Cir.), *cert. denied*, 506 U.S. 918 (1992). Although differing in result, their reasoning does not conflict.

The United States argues that the Third Circuit should have followed the Ninth Circuit's ruling in *De Laurentiis* instead of its prior decision in *Norton*. However, the Third Circuit below correctly distinguished *De Laurentiis*, noting that the Ninth Circuit explicitly predicated its opinion on the specific facts before it. In *De Laurentiis*, the creditor timely filed a proof of claim asserting setoff, requested relief from the automatic stay prior to confirmation to accomplish the setoff, was a party to an adversary proceeding before the bankruptcy court regarding its setoff rights, and "pursued its claim diligently before the bankruptcy court at all times." *De Laurentiis*, 963 F.2d at 1271.

In contrast, petitioner failed to assert or disclaimed setoff rights in its proofs of claims. The United States never counterclaimed in *Alaska Airlines* nor moved for relief from stay or asserted setoff prior to plan confirmation in the bankruptcy case. At confirmation, the United States negotiated a right of setoff solely in relation to taxes. Moreover, whereas the *De Laurentiis* plan was silent as to setoff, Continental's confirmed Plan specifically ceded control of the election to set off a claim to the reorganized debtor.

De Laurentiis was based expressly on the unfairness that would result if a creditor's setoff rights were extinguished notwithstanding the contrary expectation of all parties at time of confirmation. *Id.* at 1277. *Accord In re Village Craftsmen, Inc.*, 160 B.R. 740, 798 n.3 (Bankr. D.N.J.

1993). The facts in the present case are markedly different: the court below found that Continental's Plan "proceeded on the justifiable expectation that the reorganized debtor faced no set-off claim." (*See* App. at 11a.)

Petitioner also attempts to manufacture a conflict with the Tenth Circuit's conclusion in *In Re Davidovich*, 901 F.2d 1533 (10th Cir. 1990). *Davidovich* addressed whether a debtor's discharge under Bankruptcy Code § 524 extinguished the right to setoff in a Chapter 7 liquidation case, a ground not argued by Continental below. As the Third Circuit noted, *Davidovich* does not concern § 1141 and the effect of confirmation of a plan. (*See* App. at 11a.) *Davidovich* and the decision below are neither related nor in conflict.

For these reasons, the "leading commentator" on bankruptcy cited by the United States stated:

> In *Norton* the IRS may have waived its right to keep the refund as security by failing to timely object to its treatment under the debtor's plan.
>
> In many respects, *Norton* is distinguishable from *Davidovich* and *Carolco* [*De Laurentiis*], and the different principles on which these very different decisions rely are not necessarily opposed.

5 Collier on Bankruptcy ¶ 553.08[2] (15th ed. 1997). Indeed, the only practical result of any difference in reasoning between the cases is that creditors secured by a right of setoff must read the proposed plan of reorganization. Given that the Third Circuit below merely follows its prior opinion in *Norton*, the situation has not changed

since this Court denied certiorari in *De Laurentiis*. No conflict between the circuits exists.

B. THE COURT BELOW CORRECTLY CONSTRUED *STRUMPF*

Petitioner also argues that the decision below cannot be reconciled with *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995). *Strumpf*'s holding, however, is unrelated to whether an unasserted right of setoff survives plan confirmation. Instead, *Strumpf* addressed solely whether a bank's temporary freeze on the debtor's bank account in order to preserve a right of setoff violated the automatic stay under 11 U.S.C. § 362(a). The Court found that the property at issue was a promise to pay and that the temporary refusal to honor that promise was neither a setoff nor an exercise of control over the debtor's property within § 362(a). *Id.* at 21.

Petitioner misconstrues *Strumpf* to stand for the proposition that a promise to pay subject to setoff is not "property of the estate" and compounds its error by proposing that an obligation subject to setoff therefore cannot vest in the debtor "free and clear" upon plan confirmation under § 1141(c). Petitioner ignores the fact that Continental owns the funds in the Court's registry; GSA's obligation was not a "promise to pay." *See In re Ionosphere Clubs, Inc.*, 164 B.R. 839 (Bankr. S.D.N.Y. 1994) (denying Petitioner's attempt to set off against *Alaska Airlines* funds due to Eastern Airlines.) Thus, the facts do not fit within Petitioner's misinterpretation of *Strumpf*.

Strumpf did not even suggest that the debtor's right to payment was not "property of the estate." Rather, the

Court observed only that the bank's temporary refusal to pay did not violate the automatic stay. The Court could not determine what Congress defined as property of the estate without reference to the Bankruptcy Code's definition of "property of the estate" in 11 U.S.C. § 541. The Court neither cites nor references § 541 in *Strumpf*. *See In re USA Diversified Products, Inc.*, 196 B.R. 801, 806 (N.D. Ind. 1996) (*Strumpf* did not purport to change what constitutes property of the estate), *aff'd*, 100 F.3d 53 (7th Cir. 1996); *see also In re Bakersfield Westar Ambulance, Inc.*, 123 F.3d 1243, 1246 (9th Cir. 1997) (bank account is intangible property right of debtor).

Further, *Strumpf* did not address how plan confirmation might affect the right to setoff. 516 U.S. at 21, n.2. The Third Circuit therefore properly rejected the Government's contention that *Strumpf* was applicable.

C. INDEPENDENT GROUNDS SUPPORT THE DECISION BELOW

1. Petitioner Cannot Set Off Against Funds Which Continental Owns.

Petitioner's question presented – whether the Plan extinguished its setoff rights – wrongly assumes that Petitioner owed a debt against which it could set off. The only courts to reach the issue found no debt and thus no setoff right. The Third Circuit did not reach the issue, finding that petitioner's setoff rights, "if any," were extinguished by the Plan. (*See* App. at 14a.)

Alaska Airlines "declared that because GSA holds funds withheld illegally, funds rightfully belonging to the airlines . . . the government had no right to the withheld

money [and] that money had to be returned." *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993). Petitioner therefore cannot establish the mutuality of debts required for setoff. The Magistrate-Judge, in her report and recommendation on appeal, concurred: "[T]he *Alaska Airlines* Fund is 'clearly **owned by**, as opposed to **owed to** the Debtor,' and thus the Government has no right to utilize this Fund to offset its debts." (App. at 43a) (*emphasis in original*) (*quoting Ionosphere Clubs*, 164 B.R. at 841.)

2. Continental's Plan Specifically Prohibits Setoff without Continental's Consent.

Continental's Plan expressly reserved the right to setoff against claims solely to *Continental*, stating:

> 14.8 *Setoffs*. Each Debtor and NewCal and the NewCal Subs may, *but shall not be required to*, set off or recoup against any Claim and the payments or other distributions to be made pursuant to the Joint Plan in respect of such Claim, claims of any nature whatsoever which such Debtor or NewCal or the NewCal Subs may have against the holder of such Claim.

(emphasis added.) (*See* Resp. App. at 20a.) Continental elected not to set off its claims here.

A creditor with notice of a proposed plan's effect on lien rights, who fails to object, is bound by the resulting alteration of its rights. *See In re Corbett*, 124 F.3d 82, 87 (2d Cir. 1997); *In re Barton Industries, Inc.*, 104 F.3d 1241, 1245 (10th Cir. 1997) (recognizing rule but finding notice in that case to be insufficient); *Trulis v. Barton*, 107 F.3d 685,

691 (9th Cir. 1995); *In re Penrod*, 50 F.3d 459 (7th Cir. 1995); *Wallis v. Justice Oaks II*, 898 F.2d 1544, 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 959 (1990); *United States Dept. of Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990); *In re Szostek*, 886 F.2d 1405 (3rd Cir. 1989) (applying rule in Chapter 13). A confirmed plan binds any creditor to its provisions even if the result would not otherwise be obtainable under applicable law had the creditor objected. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Jones v. Keene Corp.*, 933 F.2d 209 (3rd Cir. 1991); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987). The reason for the broad scope of § 1141(a) (and its counterpart, § 1327) is the need for finality and certainty. *In re Szostek*, 886 F.2d at 1406; *In re Norton*, 717 F.2d at 774; *In re Brenner*, 189 B.R. 121, 126 (Bankr. N.D. Ohio 1995).

Creditors are obliged to actively protect their claims. *See In re Penrod*, 50 F.3d at 463; *In re Szostek*, 886 F.2d at 1414; *Heins v. Ruti-Sweetwater, Inc. (In re Ruti-Sweetwater, Inc.)*, 836 F.2d 1263 (10th Cir. 1988). The minimal level of diligence required by the ruling below is no greater a burden than other provisions of the Bankruptcy Code impose on creditors in the interests of finality. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992) (barring a tardy challenge to an improper claim of exemption). Here, the United States made only one objection related to the right of setoff and then agreed to limit that right.

An order of confirmation is a final judgment. *In re Lykes Bros. Steamship Co.*, 217 B.R. 304, 310 (Bankr. M.O. Fla. 1997) (citing *Stoll v. Gottlieb*, 305 U.S. 165, *reh'g denied*, 305 U.S. 675 (1938)). The Bankruptcy Court's jurisdiction,

Petitioner's full and fair opportunity to raise objections, Petitioner's participation in the confirmation proceedings, and the finality of the order confirming Continental's Plan are undisputed. Section 1141(a) and the doctrine of *res judicata* now preclude Petitioner's assertion of setoff rights in contravention of both the Plan and the order confirming it. *Lykes Bros.*, 217 B.R. at 310.

The Third Circuit did not comment on the effect of the Plan language, but the District Court found it also dispositive. (*See* App. at 28a-29a.) Petitioner attempts to sidestep this independent ground for affirmance by claiming that the Plan "did not provide for or mention the setoff rights of creditors," but only Continental's setoff rights. The equitable doctrine of setoff is, however, a mutual right. *Strumpf*, 516 U.S. at 17. Petitioner, therefore, draws a distinction without a difference; one party cannot set off without requiring the same of the other party. Here, Continental's Plan controls the mutual right. No matter how the right is characterized, petitioner cannot require Continental to set off in contravention of § 14.8 of the confirmed Plan.

In bankruptcy, setoff is discretionary. *U.S. v. Norton*, 717 F.2d at 772; *In re Penn Cen. Trans. Co.*, 486 F.2d 519, 529 (3rd Cir. 1973) (*en banc*), *cert. denied sub nom., Chicago and North Western Transp. Co. v. Baker*, 415 U.S. 990 (1974), *and cert. denied sub nom., Baker v. Indiana Harbor Belt R.R. Co.*, 415 U.S. 990 (1974). Continental's Plan left setoff to Continental's discretion. As the District Court stated, the Plan "expressly prohibits the United States from setting off its claims without Continental's approval," a result reached

independent of § 1141(c). (*See* App. at 29a-30a.) Where, as here, the court's findings of fact are not clearly erroneous, its decision will not be upset on appeal absent an abuse of discretion. *Meridian Bank v. Allen*, 958 F.2d 1226, 1230, n.2 (3rd Cir. 1992); *In re Vertientes, Ltd.*, 845 F.2d 57, 59 (3rd Cir. 1988).

3. The United States Waived Its Right of Setoff.

In distinguishing *De Laurentiis*, the Third Circuit noted the United States filed proofs of claim, but failed to assert any right to setoff. (*See* App. 2a, 12a.) The right to setoff is waived if not asserted when the creditor elects to participate in the bankruptcy case by filing a claim. *In re Calore Express Co.*, 199 B.R. 424 (Bankr. D. Mass. 1996); *In re Apex Int'l Management Serv., Inc.*, 155 B.R. 591, 595 (Bankr. M.D. Fla. 1993), *aff'd*, 1996 WL 172210 (M.D. Fla. 1996); *In re Britton*, 83 B.R. 914, 919-20 (Bankr. E.D.N.C. 1988); *In re Butler*, 61 B.R. 790 (Bankr. S.D. Fla. 1986). *See also In re Metropolitan International, Inc.*, 616 F.2d 83, 95 (3rd Cir. 1980) (the right of setoff is a privilege which must be asserted or it will be considered waived and lost); *In re Mauch Chunk Brewing Co.*, 131 F.2d 48 (3rd Cir. 1942). *Compare with In re Wells*, 125 B.R. 297 (Bankr. D. Colo. 1989).

The District Court and the Third Circuit did not find it necessary to reach this point, but both the Bankruptcy Court and the Magistrate Judge found that the government's proofs of claim, along with other facts, demonstrated a waiver. (*See* App. at 50a-51a, 54a-55a.) Here, the United States agreed to restrict its setoff rights to IRS claims. Only the FAA asserted any material setoff right in

a proof of claim, but then agreed to treatment of its claim "as a general unsecured claim" not reduced by any setoff right. (*See* Resp. App. at 15a.) In return, Continental and its creditors relinquished the right to subordinate the FAA's pre-petition penalty claims. (*See* Plan §§ 1.43, 1.139 and 1.169, Resp. App. at 18a-19a.) Section 14.14(b) of Continental's Plan thus specifically treated the FAA as a "general unsecured creditor with an Allowed General Unsecured Claim." (*See* Resp. App. at 21a.) Similarly, the United States requested and received special treatment in the Plan for the DOT's claim without reduction for any setoff. Under Section 14.14(a) of the Plan, its general unsecured claim was paid in full as a priority administrative expense. (*See* Resp. App. at 20a.)

The United States accepted the advantage of better treatment for its claims to the detriment of creditors while keeping them unaware of its intent to claim the advantage of setoff for its general unsecured claims. The right to setoff may be lost if the creditor's conduct is inconsistent with a subsequent claim to such right. *See Cumberland Glass Mfg. Co. v. DeWitt and Co.*, 237 U.S. 447, 459 (1915); *In re Public Service Co. of New Hampshire*, 884 F.2d 11 (1st Cir. 1989). By negotiating for inconsistent treatment, the United States waived any right to setoff. *In re Holly's, Inc.*, 190 B.R. 297, 301 (Bankr. W.D. Mich. 1995). Further, the United States allowed Continental to spend years attempting to recover the illegally withheld funds without ever counterclaiming or amending its proofs of claim, but instead remaining silent for long after the

Comptroller General's decisions and even after the District Court entered an injunction requiring return of Continental's money. *See In re Apex Int'l Management Serv., Inc.*, 155 B.R. at 595-96 (silence supports waiver).

Section 553 does not prohibit a creditor from waiving the right of setoff. *See In re Holder*, 182 B.R. 770 (Bankr. M.D. Tenn. 1995); *In re Custom Center, Inc.*, 163 B.R. 309, 317 (Bankr. E.D. Tenn. 1994) (recognizing application of waiver against IRS, but finding no waiver on the facts); *In re Gehrke*, 158 B.R. 465, 468-9 (Bankr. N.D. Iowa 1993). The finding of a waiver was not an abuse of discretion and should be affirmed. *In re Cascade Roads, Inc.*, 34 F.3d 756, 769 (9th Cir. 1994).

4. The Obligations Here Lack the Mutuality Required for Setoff.

Section 553 of the Bankruptcy Code specifically limits setoff to a "creditor's mutual" debts. To be "mutual," the debts must be owed by the same creditor entity as the entity holding the claim. The Bankruptcy Code defines "governmental units" as separate departments, agencies and instrumentalities of the United States and therefore as separate "creditors." *See* 11 U.S.C. §§ 101(27), (15), (10) (defining "governmental unit," "entity," and "creditor," respectively.) In this case, the United States attempts to setoff GSA's obligation to return $4.6 million in funds illegally withheld against the allowed bankruptcy claims of nine other federal agencies. As the Bankruptcy Court held, the debts lack the mutuality required by 11 U.S.C. § 553(a). (App. 53a-54a.) *See In re Lakeside Community*

Hosp., Inc., 151 B.R. 887 (N.D. Ill. 1993); *In re Hancock*, 137 B.R. 835 (Bankr. N.D. Okla. 1992).

This case illustrates why various governmental units cannot be one creditor. The GSA's refusal to recognize the Comptroller General's authority mandated injunctive relief. *Alaska Airlines*, 801 F. Supp. at 770. Ten different governmental agencies filed separate proofs of claims. Three filed separate objections to confirmation of Continental's Plan on different grounds. All three and the DOT separately negotiated for disparate treatment on the basis of their differing interests, priorities and powers. The facts demonstrate the absence of any basis on which to maintain the fiction of different agencies as a unitary creditor.

Most decisions supporting a right to interagency setoff rely on *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536 (1946). *See, e.g., In re HAL, Inc.*, 122 F.3d 851 (9th Cir. 1997); *Turner v. Small Business Administration*, 84 F.3d 1294 (10th Cir. 1996) (*en banc*). *Cherry Cotton*, a non-bankruptcy case decided long before the current Bankruptcy Code, does not address the reality that various federal entities have independent contracting authority, are represented by separate counsel in bankruptcy proceedings, rarely act in concert, assert different priorities, and are subject to varying legal requirements respecting when and under what circumstances they may exercise setoff. *See generally* 31 U.S.C. § 3716 (administrative offset); *Cf. In re Britton*, 83 B.R. 914 (Bankr. E.D.N.C. 1988). Moreover, *Cherry Cotton* does not address the Bankruptcy Code's strict requirements of mutuality under § 553 or the policies that underlie the comprehensive changes it

made to bankruptcy law and practice, including the specific inclusion of departments, agencies, and instrumentalities of the United States as "governmental units" under § 101(27). Therefore, *Cherry Cotton* is not controlling.

Neither the District Court nor the Third Circuit reached the mutuality issue, although the Magistrate Judge recommended affirmance on this alternative basis. (*See* App. at 44a-48a.) Final disposition of this case cannot occur without consideration of this ground.

D. THE THIRD CIRCUIT CORRECTLY DECIDED THE CASE

Upon confirmation of its Plan, Continental's funds, deposited with the Bankruptcy Court by the United States pursuant to the injunction of the District Court, vested in Continental "free and clear of all claims and interests," except as provided in the Plan. *See* 11 U.S.C. § 1141(c). Section 101(5) of the Code defines "claim" as, *inter alia*, a "right to payment . . . secured or unsecured." Section 506(a) of the Code defines a secured claim as "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, *or that is subject to setoff under section 553 of this title.*" (Emphasis added.) To the extent the United States had a right to setoff, it was the holder of a secured claim. Secured claims are precisely the kind of claims encompassed within the phrase "all claims or interests" of § 1141(c). *See In re Penrod*, 50 F.3d at 463.

Further, Continental's Plan specifically vested all property of the estate in the reorganized debtor, free and

clear of any "Claims." (*See* Resp. App. at 25a.) The Plan defined "Claim" as "any right to payment . . . secured or unsecured." (*See* Resp. App. at 18a.) Thus, the Plan vested Continental's claim against the GSA in reorganized Continental free and clear of any right to payment in favor of the United States.

If the property at issue is dealt with under a plan, interests therein which are not specifically provided for will be extinguished. *See In re Penrod*, 50 F.3d at 462; *In re Be-Mac Transport Company, Inc.*, 83 F.3d 1020, 1025 (8th Cir. 1996); *In re Village Craftsmen, Inc.*, 160 B.R. 740 (Bankr. D.N.J. 1993). Although Petitioner contends that debtors will therefore "have every incentive to omit any reference to setoff rights in the Plan," this Court rejected a similar argument in *Taylor v. Freeland & Kronz*, 503 U.S. at 643-644. The United States was required to, but did not, object to Continental's Plan in order to preserve alleged setoff rights besides those to which Continental consented. *In re Village Craftsman*, 160 B.R. at 748. Any rights of setoff Petitioner had were extinguished.

Had Congress intended to insulate claims subject to setoff from those provisions of the Code that affect secured claims, they would be excluded from the definition of secured claims in § 506. To accord § 553 such sweeping preemption would violate a cardinal rule of statutory construction by rendering the inclusion of claims subject to setoff in § 506(a) mere surplusage. *Bailey v. United States*, 516 U.S. 137, 145 (1995). *De Laurentiis*, upon which Petitioner relies, did not consider this potential statutory conflict at all.

Instead, § 553's "does not affect" language has a more reasonable construction. Section 553 does not itself create any right of setoff; the section merely recognizes and preserves setoff rights that exist under other applicable law. *See Strumpf*, 516 U.S. at 17; *see In re Bevil, Bresler & Shulman Asset Management Corp.*; 896 F.2d 54, 57 (3rd Cir. 1990). Section 553's "does not affect" language effectuates the purpose of recognition and preservation, but not creation, of setoff rights.

A proper construction of § 553 easily reconciles any purported conflict with § 506: Section 553 means that the right of setoff is preserved under the Bankruptcy Code, *but claims subject to a right of setoff will be treated as secured claims*. Only then is the language of both statutes given effect. Thus, claims secured by a right of setoff are subject to those provisions of the Code that apply to secured claims generally, such as the rights to and restrictions on collection of interest, fees and costs in § 506(b) or the effects of cramdown pursuant to 11 U.S.C. § 1129(b). *See* 7 Collier on Bankruptcy ¶ 1129.05[2] (15th ed. 1997). If the Plan's treatment of its alleged secured claim was unacceptable, Petitioner needed to object just like any other holder of a secured claim.

III. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case Nos. 90 932
CONTINENTAL AIRLINES, INC., et al.,	)	through 90 984
Debtors.	)	

STIPULATED WITHDRAWAL OF UNITED STATES INTERNAL REVENUE SERVICE'S OBJECTION TO DEBTORS' SECOND AMENDED PLAN OF REORGANIZATION

Continental Airlines, Inc., et al., Debtors and Debtors-in-Possession, ("Continental"), and the United States Internal Revenue Service (the "IRS"), through their respective undersigned counsel, hereby stipulate to withdrawal of the IRS's Objection to Debtors' Second Amended Plan of Reorganization (the "Objection"), as follows:

1. The IRS filed its Objection to confirmation of Continental's Revised Second Amended Joint Plan of Reorganization (the "Plan"), objecting to the Plan's proposed treatment of Priority Tax Claims and tax claims which are secured by virtue of a right of setoff under §§ 553 and 506 of the Bankruptcy Code.

2. Capitalized terms used herein shall have the same meaning as in the Plan.

3. Continental will satisfy the Allowed Priority Tax Claims of the IRS by making equal annual installments of principal and interest, which interest shall be calculated pursuant to the rate in effect from time to time under 28

U.S.C. § 6621(a)(2) commencing on the Effective Date, with the first such installment due one year from the Effective Date of the Plan, which installments shall be calculated by amortizing the amount of each tax comprising the Allowed Priority Tax Claim over a six year period that is calculated from the earlier of the date of assessment of each respective tax or the Effective Date of the Plan. Any Allowed Priority Tax Claim for a tax which was assessed more than six years prior to the Effective Date shall be paid in full, in cash upon the 76th day after the Effective Date or, in the event of a timely objection to a tax claim, 30 days after the date such tax claim is Allowed by the Court.

4. Continental waives any rights it might have under Section 4.1 of the Plan to require that any payment made to the IRS prior to or after the Effective Date with respect to any Allowed Priority Tax Claim shall be applied first against any Allowed Trust Fund Tax Claim owing to the IRS.

5. Delivery to the IRS of the Priority Tax Notes shall not, by itself, be deemed to satisfy the Allowed Priority Tax Claims of the IRS, or Continental's obligations under § 1129(a)(9)(C), but are simply to set forth the agreed payment schedule for the Allowed Priority Tax Claims.

6. Notwithstanding any provision in the Plan, the IRS shall not be precluded from asserting any claims and causes of action for its Priority Tax Claims against any present or former officer or director of Continental, including the right to assess any such claim, except that the IRS hereby waives its ability to collect any such

assessment or claim which it may have against any present or former officers or directors of Continental during any and all time periods in which Continental is in compliance with this Stipulation. Nothing in this paragraph or this Stipulation shall be deemed to be a waiver by the present or former directors or officers or [sic] Continental of any rights or defenses they may have under applicable law to any such claims which may be asserted by the IRS, or any admission that such claims exist.

7. All tax claims of the IRS secured under § 506 by virtue of the right to setoff a mutual debt owed to the debtor shall be paid by allowing the IRS to exercise the right to setoff such debt under § 553. The IRS shall be allowed to exercise its right of setoff on the 76th day after the Effective Date or, in the event of a timely objection to such a Secured Tax Claim, 30 days after the date such Tax Claim is allowed by the Court.

8. This Stipulation does not resolve the amounts in which any Priority Tax Claims or Secured Claims of the IRS may be Allowed or the priority of any tax claimed, but resolves only the manner in which such Priority Tax Claims and Secured Claims, when and if Allowed as provided in the Plan, will be paid by Continental under the Plan.

9. If required by the Bankruptcy Court or if otherwise deemed advisable by Continental, Continental will amend the Plan to comport with this Stipulation. If Continental does not amend the Plan to comport with paragraphs 4 and 6 hereof, such provisions shall be recited in the order entered by the Bankruptcy Court confirming the Plan.

10. This Stipulation shall constitute the full agreement between the parties hereto regarding payment of the Allowed Priority Tax Claims and Secured Claims owed to the IRS, except as such claims are addressed in prior stipulations and agreements between the parties, and nothing herein shall serve to prejudice or prevent Continental from agreeing to any different terms or arrangements with any other taxing authorities, as part of a stipulation or otherwise, if Continental, in its sole discretion, deems it in its best interest to agree to such terms. Moreover, nothing in this Stipulation shall be deemed to be a waiver by Continental of any rights it may have under the Plan as to any other person or entity, nor may any of the terms in this Stipulation be used by any other party to construe the Plan.

11. The Stipulation resolves all objections asserted by the IRS to confirmation of the Plan, and the IRS's objection will be deemed withdrawn upon Court approval hereof.

Respectfully submitted this 16th day of March, 1993.

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& TAYLOR
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ATTORNEYS FOR THE
UNITED STATES INTERNAL
REVENUE SERVICE

CERTIFICATE OF SERVICE

I, Robert S. Brady, Esquire, hereby certify that I caused the foregoing document to be served in the manner indicated upon the following:

VIA FEDERAL EXPRESS

The Hon. Thomas E. Ross
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Bennett J. Murphy, Esquire
Latham and Watkins
53rd at Third
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VIA HAND DELIVERY

Ellen Slights
Assistant United States Attorney
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1201 Market Street, Suite 1100
Wilmington, DE 19899-2046

Dated at Wilmington, Delaware this 17th day of March 1993.

/s/ Robert S. Brady
ROBERT S. BRADY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Case Nos. 90-932 through 90-984
CONTINENTAL AIRLINES, INC., *et al.*,	:	Jointly Administered Under Case No. 90-932
Debtors.	:	

STIPULATION BY AND BETWEEN THE UNITED STATES OF AMERICA AND THE DEBTORS AS TO RESOLUTION AND WITHDRAWAL OF CERTAIN OBJECTIONS TO DEBTORS' REVISED SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED

This stipulation, which is subject to Bankruptcy Court approval, is being made by and between The United States of America (the "U.S. Government") and Continental Airlines, Inc., *et al.* debtors and debtors-in-possession ("Continental" or "Debtors"), acting by and through their respective undersigned counsel, as follows:

1. The United States Department of Justice, on behalf of the Department of Agriculture ("USDA") and the Federal Aviation Administration ("FAA"), filed timely objections to confirmation of Continental's Revised Second Amended Joint Plan of Reorganization (the "Plan").

2. Continental and the U.S. Government have subsequently negotiated concerning such objections and have reached the agreement set forth herein to settle such objections.

3. The Debtors will file a further Modification to the Plan prior to the conclusion of the confirmation hearing on the Plan. Such modification will add the following language at the end of Section 12.4(a) of the Plan:

> "; and *provided, further, however,* that the provisions of this Section 12.4(a) shall not apply to claims or causes of action by the United States or any agency thereof."

4. This Stipulation resolves: a) the objections of the USDA to confirmation of the Plan and b) that portion of the FAA's objections pertaining to the provisions set forth in Section 12.4(a) of the Plan. Upon entry of the order approving this Stipulation, the USDA's objections and the relevant portion of the FAA's objections will be deemed withdrawn with prejudice.

Dated: Wilmington, Delaware
April 7, 1993

YOUNG, CONAWAY, STARGATT
& TAYLOR

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/s/ Ellen W. Slights
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SO ORDERED:

_____

UNITED STATES BANKRUPTCY
JUDGE

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:

CONTINENTAL AIRLINES, INC. et al.,

Chapter 90-932
Case No. 90-984

Debtors.

SETTLEMENT AGREEMENT BETWEEN
THE FEDERAL AVIATION ADMINISTRATION
AND
CONTINENTAL AIRLINES, ET AL.

This Agreement is entered into on November 26, 1991, between the Federal Aviation Administration (hereinafter "the FAA") and Continental Airlines, Inc., and its affiliated companies: Peoples Express Airlines, Inc., New York Air, Inc., Frontier Airlines, Inc., Britt Airways, Inc., Rocky Mountain Airways, Inc., and Bar Harbor Airlines, Inc., doing business as Continental Express, their successors in interest or assignees (hereinafter collectively referred to as "the Company").

Recitals

A. The Company holds Air Carrier Operating Certificates and operations specifications issued thereunder by the FAA authorizing it to engage in operations in air transportation under Parts 121 and 135 of the Federal Aviation Regulations (14 C.F.R. Part 1, *et seq.*; hereinafter "the FAR").

B. The Company is subject to civil penalty not to exceed $10,000 for each violation of the Federal Aviation Act of 1958, as amended, (hereinafter "the Act"), (49 U.S.C. App. 1471), the Hazardous Materials Transportation Act (49 U.S.C. App. 1809), (hereinafter "the HMTA"), the FAR, and the Department of Transportation Hazardous Materials Regulations (hereinafter "the HMR"), including requirements involving maintenance, operations, and security in air transportation as specified in Parts 91, 108, 121, and 135 of the FAR and the transportation of hazardous materials by air as specified in the HMR.

C. On December 3, 1990 (the "petition date"), the Company filed a petition in the United States Bankruptcy Court for the District of Delaware to effect a reorganization pursuant to Chapter 11 of Title 11 of the United States Code.

D. The FAA has notified the Company of violations by the Company of the Act and/or the FAR alleged to have occurred prior to the Petition Date, which alleged violations are more particularly described in civil penalty letters, notices of proposed civil penalty, letters of investigation, and other documents.

E. The FAA and the Company mutually desire to resolve all outstanding disputes between them concerning the foregoing matters.

F. The Company offered, pursuant to section 901(a)(2) of the Act (4 U.S.C. App. 1471(a)(2)), three million, four hundred five thousand, seven hundred dollars ($3,405,700) to effect a compromise settlement of all civil

penalties for alleged prepetition date violations of maintenance, operations, security, and hazardous materials regulations.

NOW THEREFORE IT IS MUTUALLY AGREED BY AND BETWEEN THE FAA AND THE COMPANY THAT:

1. The FAA accepts the Company's compromise offer in full settlement of any civil penalties the Company may have incurred under the Act or any regulations issued thereunder or under the HMTA or any regulations issued thereunder for the alleged violations described above. This settlement is applicable to any and all such violations which occurred at any time prior to the Petition Date without regard to whether or not the FAA has notified the Company of any such alleged violation.

2. The compromise amount provided for in this Settlement Agreement shall be deemed a general, unsecured claim in favor of the FAA and, as such, is undisputed and allowed in the amount of $3,405,700.

3. The FAA will take no other action to recover civil penalties from the Company for violations of the Act, the HMTA, the FAR, or the HMR occurring before the Petition Date, and the FAA will not take certificate action under Section 609 of the Act (49 U.S.C. App. 1429) for any maintenance, operations, or security violations that occurred before the Petition Date; provided, however, that nothing herein shall preclude the FAA from taking such alleged violations into consideration when addressing violations which occur after the Petition Date and which in the FAA's view warrant remedial certificate action.

4. It is understood and agreed that the offer by the Company and its acceptance by the FAA do not constitute an admission by the Company with respect to said alleged violations. The offer does not constitute acceptance or agreement by the Company with the procedural regulations set out in 14 C.F.R. Part 13.

5. As to cases for violations occurring before the Petition Date which have been initiated under the civil penalty assessment authority of the FAA (14 C.F.R. Section 13.16), this Agreement shall constitute a Compromise Order under 14 C.F.R. Section 13.16(1)(1).

6. Promptly after execution of this Settlement Agreement and after approval thereof by the Bankruptcy Court on or before November 26, 1991, the FAA will file in the Bankruptcy Court a Proof of Claim in the amount of $3,405,700. Both parties will seek to obtain the approval of this Settlement Agreement by the Bankruptcy Court. In the event said approval is not obtained, this Settlement Agreement shall be null and void and of no effect whatsoever. If the Bankruptcy Court does not approve this Settlement Agreement on or before November 26, 1991, the parties agree that the FAA thereafter may file in the Bankruptcy Court a Proof of Claim in the form, in the manner, and in the amount, that it deems appropriate.

7. This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assignees. This Agreement shall not be amended, modified, waived or supplemented in whole or in part except in writing and with the written consent of the parties hereto.

8. With respect to payment of the compromise settlement amount of $3,405,700, the FAA recognizes and acknowledges that it is a general, unsecured creditor of the Company. The Company agrees that its Plan of Reorganization or other Plan filed in connection with Case No. 90-932 through 90-984 (U.S. Bankruptcy Court for the District of Delaware) shall provide that the FAA is a general, unsecured creditor with an allowed and undisputed general, unsecured claim totalling $3,405,700. Under the Plan, the treatment of the FAA's allowed claim shall be equal to the best treatment afforded any other general unsecured creditor's allowed claim. The FAA expressly reserves its right to object to any Plan of Reorganization or other Plan submitted by the Company in the event that the Plan does not fully comply with the terms of this Agreement. Payment shall be made to the FAA at the Office of the Chief Counsel.

9. This Agreement and the terms and conditions hereof shall survive the execution and delivery of the Agreement and entry of an order of the Court approving the Agreement, confirming a Plan of Reorganization or other Plan, appointing a trustee or examiner for the Company and/or converting the case from a Chapter 11 case to a Chapter 7 case.

IN WITNESS WHEREOF, the FAA and the Company acting by and through their duly authorized representatives have duly executed this Settlement Agreement as of the day and year first above written.

/s/ J. David Grizzle
J. David Grizzle
Assistant Secretary
For the Company

/s/ John H. Cassady
John H. Cassady
Deputy Chief Counsel
For the Federal Aviation Administration

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	Case Nos.
	§	90-932 through 90-984
CONTINENTAL AIRLINES, INC.,	§	
et al.,	§	Jointly Administered
	§	Under Case No. 90-932
Debtors.	§	

DEBTORS' REVISED SECOND AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

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Dated: Houston, Texas
January 13, 1993

* * *

ARTICLE 1.

DEFINITIONS

As used in this Joint Plan, the following terms shall have the respective meanings specified below:

* * *

1.43. Claim: Any right to payment from any of the Debtors, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured arising at any time before the Effective Date or relating to any event that occurred before the Effective Date; or any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment from any of the Debtors, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

* * *

1.139. Penalty Claim: Any Claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the Petition Date, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary losses suffered by the holder of such claim.

* * *

1.169. Subordinated Claim: Any Penalty Claim and any Unsecured Claim which (i) by its terms or by agreement is subordinated to the payment of any other

Unsecured Claim, (ii) is subordinated to the payment of another Claim pursuant to any applicable provision of the Bankruptcy Code (including, without limitation, sections 510(b) and 509(c) thereof) or applicable non-bankruptcy law, (iii) is equitably subordinated to the payment of another Claim by a Final Order of the Bankruptcy Court entered pursuant to section 510(c) of the Bankruptcy Code. Subordinated Claims include, but are not necessarily limited to, all CAL 11% Subordinated Debenture Claims, all CAL 3.5% Convertible Subordinated Debenture Claims, the Rubicon Note Claims, all CTA 6% Convertible Subordinated Note Claims, all CTA 10% Exchangeable Subordinated Debenture Claims and all CTA Subordinated Guarantee Claims.

* * *

ARTICLE 12.

MEANS FOR IMPLEMENTATION OF THE JOINT PLAN

* * *

12.11. Revesting of Assets; No Further Supervision. The assets of each Debtor and all property of each Debtor's estate (including without limitation, all rights of the Debtors to recover property under sections 542, 543, 550 and 553 of the Bankruptcy Code, and all avoiding powers under sections 522(f), 522(h), 544, 545, 547, 548, 549 or 724(a) of the Bankruptcy Code and all proceeds thereof) shall revest in NewCal (which shall convey the assets of the Commuter Debtors to NewEx and the assets of the System One Debtors to NewOne), in each case free and clear of all Claims and Equity Interests, including, without limitation, any and all Eastern Claims, but subject to the obligations of NewCal and the NewCal Subs as

specifically set forth in this Joint Plan. The Joint Plan does not contain any restrictions or prohibitions on the conduct of the business of NewCal, NewEx or NewOne. NewCal and the NewCal Subs may use, operate and deal with their respective assets, and may conduct and change their businesses, without any supervision by the Bankruptcy Court or the Office of the United States Trustee, and free of any restrictions imposed on the Debtors by the Bankruptcy Code or by the Bankruptcy Court during the Chapter 11 Case.

* * *

ARTICLE 14.

MISCELLANEOUS PROVISIONS

* * *

14.8. Setoffs. Each Debtor and NewCal and the NewCal Subs may, but shall not be required to, set off or recoup against any Claim and the payments or other distributions to be made pursuant to the Joint Plan in respect of such Claim, claims of any nature whatsoever which such Debtor or NewCal or the NewCal Subs may have against the holder of such Claim to the extent such claim may be set off or recouped under applicable law, but neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by such Debtor or NewCal or the NewCal Subs, of any such claim that it may have against such holder.

* * *

14.14. Implementation of DOT and FAA Stipulations.

(a) Pursuant to (i) the DOT's Consent Order No. 91-7-11, dated July 11, 1991, as amended by Order

91-8-42, dated August 20, 1991, and (ii) the Bankruptcy Court's "Order Granting Motion to Approve Settlement and Fixing of Allowed Claim Amount for the U.S. Department of Transportation," dated November 26, 1991, the DOT has (subject to confirmation of this Joint Plan) an Allowed Administrative Claim against CAL in the amount of $30,000, and pursuant to the terms of the foregoing orders, such Allowed Administrative Claim shall be paid in full within one year from the date on which the Confirmation Order becomes a Final Order. Pursuant to the Orders referred to above, such Allowed Administrative Claim is to bear interest at the rate set for interest on General Unsecured Claims under this Joint Plan. Because no interest will be paid upon Allowed General Unsecured Claims pursuant to this Joint Plan, the DOT's Allowed Administrative Claim of $30,000 shall not bear interest.

(b) Pursuant to the "Settlement Agreement Between the Federal Aviation Administration and Continental Airlines, et al.", dated November 26, 1992, and approved by the Bankruptcy Court, the Federal Aviation Administration is a general unsecured creditor with an Allowed General Unsecured Claim against CAL in the amount of $3,405,700. Such Allowed General Unsecured Claim is a Class A General Unsecured Claim pursuant to this Joint Plan and shall be treated under this Joint Plan in the same manner as all other Allowed Class A General Unsecured Claims.

* * *

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case Nos.
	)	90-932 through 90-984
CONTINENTAL AIRLINES, INC., *et al.*,	)	
	)	
Debtors.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING THE DEBTORS' REVISED SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED, UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND GRANTING RELATED RELIEF

Continental Airlines, Inc. ("CAL"), Continental Airlines Holdings, Inc. ("CTA") and the affiliated debtors and debtors-in-possession in these jointly-administered Chapter 11 cases (collectively, the "Debtors"), having filed with the Court the Debtors' Revised Second Amended Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, dated January 13, 1993, and having modified such Plan by Modifications filed with the Court on March 12, 1993, April 9, 1993, and on April 16, 1993 (as so modified, the "Plan"; capitalized terms used in this Order and not otherwise defined shall have the respective meanings ascribed to such terms in the Plan); and the Debtors' Revised Third Amended Disclosure Statement, dated January 13, 1993 (the "Disclosure Statement"), having been filed with and approved by the Court pursuant to an order dated January 8, 1993 (the "Disclosure Statement Order") as containing "adequate information" pursuant to section 1125 of title 11,

United States Code (the "Bankruptcy Code"); and copies of (a) the Plan, (b) the Disclosure Statement, (c) a letter of the Official Committee of Unsecured Creditors in a form approved by the Court, and (d) the appropriate ballot(s) (for those Creditors entitled to vote on the Plan), having been transmitted to all Creditors entitled to receive the same pursuant to the Disclosure Statement Order, the United States Trustee, Counsel for the Official Committee of Unsecured Creditors and the Official Committee of Equity Security Holders, all indenture trustees and those parties who have filed notices of appearance in the Debtors' Chapter 11 cases pursuant to Bankruptcy Rule 2002, the Securities and Exchange Commission, the District Director of Internal Revenue for the district in which these Chapter 11 cases are pending, and the United States Attorney for the District of Delaware, all in accordance with the Disclosure Statement Order; and the Disclosure Statement Order having fixed (a) on or before 4:00 p.m. Eastern Standard Time, on February 16, 1993 or, if the Disclosure Statement and related solicitation materials were mailed to a Creditor after January 19, 1993, with respect to such Creditor, the 28th day after they are so mailed, as the last date and time by which all Ballots must be properly completed, executed, marked and received by the Debtors at one of the addresses specified for that purpose in the Disclosure Statement and in the Published Notice described in the Disclosure Statement Order, in order to be considered as acceptances or rejections of the Plan; and (b) February 23, 1993 (which date was thereafter continued to March 16, 1993, by order of the Court), at 9:30 a.m., as the time and date for the

hearing pursuant to sections 1128 and 1129 of the Bankruptcy Code (the "Confirmation Hearing") to consider confirmation of the Plan and any objections thereto including, without limitation, any objection to the Disclosure Statement dealing with a confirmation issue (the "Objections"); and due notice of the Confirmation Hearing and the date by which Objections must be filed having been given and published in accordance with the terms of the Disclosure Statement Order; and due notice of the continuance of the Confirmation Hearing to March 16, 1993, having been given; and the Court having ruled at the Disclosure Statement Hearing that consideration of objections to the Disclosure Statement dealing with a confirmation issue would be deferred until the Confirmation Hearing without the need for refiling; and the Confirmation Hearing having been held before the Court beginning on March 16, 1993 and continuing thereafter on March 17, 18, 19, 25, 26 and 30, 1993 and April 7 and 16, 1993; and the appearance of all interested parties having been noted on the record; and the Court having considered all objections to confirmation of the Plan and to this Order; and upon all the record and the evidence adduced at the Confirmation Hearing (including testimony and exhibits admitted into evidence) and upon the Debtors' Memorandum in Support of Confirmation of the Plan, and upon the Affidavits submitted in support of confirmation of the Plan and upon the submissions, including affidavits and offers of proof, at the Confirmation Hearing, the arguments and representations of counsel, and all pleadings and proceedings had herein, the Court makes the following Findings of Fact and Conclusions of Law setting forth the reasons for the Court's issuance of this

Order confirming the Plan, overruling the outstanding Objections, and granting the other relief provided for herein:

THE COURT HEREBY FINDS THAT:

* * *

11. In accordance with section 1141 of the Bankruptcy Code, and except for any security interests provided under the Plan or contemplated by the Financing Transaction, any property transferred or otherwise dealt with in the Plan shall be free and clear of all Claims against and Equity Interests in the Debtors, and all such property of the Debtors' estates shall, on the Effective Date, vest in those entities as designated in and provided for by the Plan. Pending the occurrence of the Effective Date, all such property shall remain property of each respective Debtor's bankruptcy estate, and such bankruptcy estates shall continue until the occurrence of the Effective Date.

* * *

33. On March 16, 1993, the Internal Revenue Service and the Debtors entered into a "Stipulated Withdrawal of United States Internal Revenue Service's Objection to Debtors' Second Amended Plan of Reorganization." Such stipulation is hereby approved pursuant to Bankruptcy Rule 9019(a) as a just, equitable and non-discriminatory compromise of the Internal Revenue Service's Objection to Second Amended Joint Plan of Reorganization, which the IRS filed on March 9, 1993.

* * *

Dated: Wilmington, Delaware
April 16, 1993

/s/ Helen S. Balick
Helen S. Balick
United States
Bankruptcy Judge

§ 101. Definitions

In this title –

* * *

(10) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

* * *

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

* * *

(27) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

* * *

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is

subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file

a proof of such claim under section 501 of this title.